IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1505

ESSEX COUNTY WELFARE BOARD, *Petitioner*

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, et al.,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

REPLY BRIEF FOR PETITIONER

MICHAEL J. HENKE
C. MICHAEL BUXTON
VINSON & ELKINS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
CHARLES D. TETRAULT

June 2, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1505

ESSEX COUNTY WELFARE BOARD, *Petitioner*

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, et al.,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

REPLY BRIEF FOR PETITIONER

Petitioner files this brief in reply to the oppositions filed by the respondent Department of Institutions and Agencies (hereafter DIA Opp.) and by the individual respondents Stowers, Engle, and Greico (hereafter Stowers Opp.).

I.

Both the Department of Institutions and Agencies and the individual respondents focus their oppositions to the petition on the assertion that the New Jersey Supreme Court's decision is based on an adequate and independent state law ground. Their arguments over-

look several important facts which establish federal law as the sole basis of the holding below.[1]

First, the state statutes and state AFDC regulations relied upon by respondents to establish that petitioner is a creature of the state legislature and a "bureau" of the respondent Department (DIA Opp. 9-12; Stowers Opp. 3) merely implement the federal statutory requirement that the states designate "a single State agency to supervise the administration of the [AFDC] plan . . .," 42 U.S.C. § 602(a)(3), and the federal regulations promulgated thereunder, 45 C.F.R. § 205.100 (Pet. 21a-22a).[2] Thus, when the New Jersey Supreme

[1] If this Court believes that it cannot, on the basis of the briefs filed herein and on a reading of the decision below, determine whether the decision is based on a federal or a state ground, petitioner submits that the proper course is to grant the petition for *certiorari*, vacate the judgment, and remand the case to the Supreme Court of New Jersey so that it may consider whether its judgment is based on state or federal grounds. *See, e.g.*, Pennsylvania v. Campana, 414 U.S. 808 (1973); California v. Krivda, 409 U.S. 33 (1972); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Minnesota v. National Tea Co., 309 U.S. 551 (1940).

[2] For example, NJSA 44:7-6 (authorizing the respondent Department to set operating, recordkeeping, and personnel standards) merely implements 45 C.F.R. § 205.100(a)(1)(ii), which requires that the single State agency make rules and regulations "governing the admiinstration of the plan" which are "binding on the political subdivisions"; moreover, the state standards set must conform to federal guidelines. *See, e.g.*, 45 C.F.R. §§ 205.30, 205.60, 205.145, 205.170, 205.200. Likewise, NJSA 44:7-8, requiring county boards to issue AFDC grants in conformity with state policies, and NJSA 44:7-18, requiring them to pay benefits when ordered to do so by the department, merely implement 45 C.F.R. § 205.100(b)(3), which provides that local agencies "must not have authority to review, change, or disapprove any administrative decision of the single State agency, or otherwise substitute their judgment for that of the agency as to the application of policies, rules, and regulations promulgated by the State agency."

Court based its decision on "the legislative intent as expressed in the Federal and State enactments" (Pet. 7a), it was not referring to any peculiarity of the New Jersey law of standing, but to what it saw to be the consequence of the single State agency system which is mandated by federal law and regulations and implemented by New Jersey statutes and regulations.

Second, the petitioner welfare board—composed of freeholders and their appointees—is the representative of the freeholders specifically charged with fiduciary responsibility for the county AFDC grant money. (Pet. 7, n. 6) The court below specifically recognized the right of the freeholders to appeal (Pet. 5a); the only ground it suggested for distinguishing petitioner is the assertion that "in administering the AFDC program, [petitioner] is a subordinate branch of the single State agency". (Pet. 6a)[3]

Third, *Redding* v. *Burlington County Welfare Board*, 65 N.J. 439, 323 A.2d 477 (1974), cited by the court below (Pet. 5a) and heavily relied upon by both respondents (DIA Opp. 11-12; Stowers Opp. 3), in fact held that local welfare boards have the right to institute suits to recover AFDC overpayments. That right is not specifically granted by statute or regulation but was held by the court to be "inherent in the delegation of authority to administer the program." 323 A.2d at

[3] The respondent Department's assertion that petitioner should be distinguished from the board of freeholders because 63 percent of its costs in taking such an appeal are paid "with funds it receives from the state" (DIA Opp. 12) is highly disingenuous. As respondent well knows, all of that 63 percent is *federal* money for which the state is merely a conduit. The remainder of petitioner's administrative costs are paid with county funds. The fact is that the State of New Jersey itself contributes *nothing* to petitioner's administrative costs.

480. The principal difference between the *Redding* case and the present case is that, in *Redding,* federal law was specifically held *not* to "bar" the suits in question. *Id.* at 479.[4]

II.

The respondent Department now concedes that the single State agency requirement "has no bearing" on the "rights" that petitioner "ought to be invested with". (DIA Opp. 9) It thus appears to agree with petitioner that the court below was wrong in holding that the single State agency requirements precludes appeal by county welfare boards from fair hearing decisions.

The individual respondents continue to argue here that appeals by county welfare boards are inconsistent with the single State agency requirement and that the decision below is required by federal law. (Stowers Opp. 8-9) In support of that argument respondents attach two letters (one of which, contrary to respondents' suggestion, was not part of the evidentiary record before the court below) written, respectively, by an Assistant Regional Attorney and an Acting Assistant Regional Commissioner. These two unpublished letters are in no sense "interpretations" of the Department of Health, Education and Welfare; they are merely the opinions of two lower-level HEW employees. Their conclusory nature, their inconsistency with the letter by HEW Deputy Administrator Rutledge

[4] Contrary to respondents' assertions (DIA Opp. 13-14; Stowers Opp. 4), the policy ground relied on by the lower court here—avoiding delay and uncertainty in welfare determinations (Pet. 6a-7a)—is a *federal* policy and not a *state* judicial policy.

(Pet. 28a-30a), and their total failure to deal with 45 C.F.R. § 205.100(b)(2), which explicitly recognizes that decisions of the single State agency may be subject to "review" by "other offices or agencies of the State government", make clear that they should be accorded no deference by this Court. Certainly, they are not entitled to "controlling weight" under *Udall* v. *Tallman,* 380 U.S. 1 (1965).[5]

CONCLUSION

For the reasons set forth above and in the petition, the petition for *certiorari* should be granted and the judgment of the Supreme Court of New Jersey reversed.

Respectfully submitted,

MICHAEL J. HENKE
C. MICHAEL BUXTON
VINSON & ELKINS
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

CHARLES D. TETRAULT

June 2, 1978

[5] Contrary to these respondents' suggestion, there is no bar to a Fifth Amendment allegation by a county welfare board against the Federal Government. The cases cited by respondents, Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1936), and South Carolina v. Katzenbach, 383 U.S. 301 (1966), are inapposite; they deal with the question whether local government entities are "persons" within the meaning of the Fourteenth Amendment. This Court has never held that a local governmental entity cannot be a "person" under the Fifth Amendment, and at least one federal appellate court has regarded the question as an open one. *See* Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2d Cir.), *cert. denied,* 414 U.S. 1146 (1973).